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December 9, 2004

The Honorable Colin Powell
Secretary of State
2201 C Street NW
Washington, DC 20520

The Honorable John W. Snow
Secretary of the Treasury
1500 Pennsylvania Ave NW
Washington, DC 20220

Dear Secretary Powell and Secretary Snow:

I am writing to follow-up on my previous letter to you again regarding the change or "clarification" to the regulations concerning payment for Cuban purchases of U.S. agricultural products that the Office of Foreign Assets Control (OFAC) has proposed.

The Trade Sanctions Reform and Export Enhancement Act of 2000 (TSREAA) stipulates that the terms of sale be "payment of cash in advance." OFAC says it will interpret that phase from now on in a way that will require that payment be made in advance of shipment. That new interpretation is significantly more restrictive than the practice which U.S. agencies have permitted for three years, which is that U.S. exporters could comply with the "payment in advance" rule so long as the exporter retained legal control of the goods until such time as payment was made.

As you consider this issue, I want to bring to your attention a legal analysis the American Law Division (ALD) of the Congressional Research Service has done for me.

The CRS memo concludes that, "Acceptance of OFAC's proposed interpretation appears likely to result in a reduction of trade with Cuba, which appears to be contrary to the express intent of the Congress."

The memo also suggests that any new measure of the type proposed by OFAC may be imposed only with Congressional approval, given TSREAA's broad definition of what constitutes a unilateral agricultural or medical sanction and the requirement that any new measure of this type may be imposed only if a joint resolution of approval is enacted into law.

I understand OFAC may already be breaking the law on this issue. Until recently, U.S. banks were permitted to deposit Cuban payments into the seller's account as soon as they were received. A few days ago, however, OFAC told the banks they have to apply for and receive a specific license from OFAC to make each such deposit. That appears to be a new restriction or condition on sales to Cuba that is prohibited by TSREAA.

I urge you to direct the officials at the Office of Foreign Assets Control to stop their efforts to hinder trade with Cuba so that U.S. farmers and ranchers can continue selling their agricultural products to that nation.

Sincerely,

A handwritten signature in black ink, reading "Byron L. Dorgan". The signature is fluid and cursive, with the first name "Byron" being the most prominent.

Byron L. Dorgan
United States Senate